Hagar Management Corp. and 1025–1045 Associates, Inc. *and* Wilfredo Arteaga *and* Venicio Bonilla *and* United Service Employees Union Local 377, R.W.D.S.U., AFL–CIO

1025–1045 Associates, Inc. *and* Local 32B–32J, SEIU, AFL–CIO. Cases 29–CA–15842, 29–CA–15907, 29–CA–15966, 29–CA–15967, and 29–CA–15945

June 17, 1997

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On February 20, 1997, Administrative Law Judge D. Barry Morris issued the attached supplemental decision. The Respondents filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Hagar Management Corp. and 1025–1045 Associates, Inc., Brooklyn, New York, their officers, agents, successors, and assigns, shall within 14 days from the date of this Order offer Anthony Mitchell and Courtney Thompson full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and shall pay them, as net backpay, the amount set forth opposite each name, plus interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and state laws

Name	*Amount Due*
Anthony Mitchell	$1,122
Courtney Thompson	3,522
TOTAL	$4,644

[1] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Henry J. Powell, Esq., for the General Counsel.

Martin Gringer, Esq. (Franklin & Gringer), of Garden City, New York, for the Respondents.

Kevin McCullough, of New York, New York, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. On September 21, 1992, Administrative Law Judge Eleanor MacDonald issued her decision in this proceeding, finding that Respondents violated Section 8(a)(1) and (3) of the Act by terminating Anthony Mitchell and Courtney Thompson. Her recommended Order provided that Mitchell and Thompson be made whole for any loss of earnings and that they be offered immediate and full reinstatement to their former positions. After the judge's decision was issued, counsel for the General Counsel and counsel for Respondents entered into settlement discussions. On November 4, 1992, counsel for the General Counsel, James Kearns, transmitted to Respondents' counsel a draft settlement agreement. On receipt of the draft agreement, Respondents' attorney questioned Kearns about the accuracy of the interim earnings reported by Mitchell. On March 22, 1993, Kearns informed Respondents' counsel that he had received a social security report which revealed that Mitchell had underreported his interim earnings by approximately $8000. Based on this information, Respondents filed a motion to reopen the record. On November 24, 1993, the Board issued its Decision and Order in this case. With respect to Respondents' motion to reopen the record, the Board stated at 313 NLRB 438 fn. 1:

> The Respondents further contend that, in any event, Mitchell's alleged fraud should be considered in connection with the judge's recommended reinstatement remedy. We find no merit in this contention. The Respondents' allegations, even if true, do not *automatically* compel a finding that reinstatement should be barred. *Owens Illinois*, 290 NLRB 1193 (1988), enfd. mem. 872 F.2d 413 (3d Cir. 1989). The impact of the alleged fraud on the remedy is a matter best left to the compliance stage of these proceedings.

The Board affirmed Judge MacDonald's decision and adopted her recommended Order. On April 21, 1995, the United States Court of Appeals for the District of Columbia Circuit entered its judgment enforcing the Board's Order (enfd. mem. 55 F.3d 684 (D.C. Cir. 1995)). The court stated:

> As to whether Mitchell's alleged fraud should have been considered in connection with the Administrative Law Judge's recommended reinstatement remedy, the Board made clear that whether Hagar Management Corporation . . . had to reinstate Mitchell remained an open question and that it would consider the impact of the alleged fraud on the remedy at the compliance stage of these proceedings.

A controversy having arisen over the backpay due each discriminatee, on March 13, 1996, the Regional Director for Region 29 issued a compliance specification and notice of hearing. Respondents filed an answer to the compliance specification on April 3, 1996. A hearing was held before me in

Brooklyn, New York, on June 18, 1996. All parties were given full opportunity to participate, to produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the General Counsel and by Respondents.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

1. The backpay period and computation of gross backpay

Counsel for the General Counsel amended the compliance specification so that the backpay period for Mitchell begins on May 15, 1991. However, the specification provides that the backpay period for Thompson begins on May 6, 1991. Respondents contend that the backpay period for Thompson should begin on May 13, 1991. Judge MacDonald found in her decision that on April 23, 1991, the building in question was purchased by Respondents. The decision further states (313 NLRB at 440), "Mitchell and Thompson continued working in the building for 3 weeks." The record in this proceeding contains the termination notice to Thompson, which is dated May 13, 1991. Thompson admitted that this was his termination notice. Accordingly, I find that Thompson was terminated on May 13, 1991, and that his backpay period begins on that date.

Judge MacDonald found that Respondent 1025–1045 Associates, Inc. (Associates) purchased the building from Blue Star Realty, Inc. on April 23, 1991, and that Respondent is a successor of Blue Star. The compliance specification uses as the measure of gross backpay the weekly wage rates of Mitchell and Thompson while they were working for Blue Star. Respondents contend that the appropriate gross backpay measure is the weekly rate paid by Respondents, which in the case of Mitchell was $287 per week and in the case of Thompson $229 per week.

As was stated in *Rainbow Coaches*, 280 NLRB 166, 173 (1986):

> The General Counsel's office has the burden of establishing gross backpay by seeking to ascertain the probable earnings of a discriminatee during the backpay period. These are earnings which would have been paid had the employee not been unlawfully discharged . . . . The compliance officer is charged with selecting the most appropriate formula to apply in a specific case.

As stated above, Judge MacDonald found that Respondent Associates purchased the building from Blue Star on April 23, 1991, and that Respondent is a successor of Blue Star. The judge found that "Sperlin told Thompson and Mitchell that the building did not bring in enough money to continue paying them at the union rate and that he did not intend to abide by the union contract" and that Ralph Sperlin and Lazar Hagar told Mitchell that "they could not afford to pay union wages." (313 NLRB at 442). The judge further found that Sperlin told the employees that "he would not pay union wages." (Id. at 445.)

In *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), the Supreme Court made it clear that a successor is entitled to set the initial terms of employment on which it would hire the predecessor's employees. However, in cases were the successor plans to retain the old employees, and makes no mention of changes in employment conditions the Board has held that the successor must bargain concerning initial terms and conditions of employment. *Royal Vending Services*, 275 NLRB 1222, 1227–1228 (1985); *Banknote Corp. of America*, 315 NLRB 1041, 1048 (1994).

As noted above, Judge MacDonald found that Sperlin told Thompson and Mitchell that "he would not pay union wages." As stated in *Burns Security*, supra, a successor employer has the right to set initial terms and conditions of employment. I find that Respondents announced that they would not pay the prior rates and that the most appropriate formula is the rate actually paid by Respondents, not the rate paid by the predecessor company.

The social security records which are in evidence show that Thompson received $468 from Respondents and Mitchell received $574 from Respondents. As noted earlier, the underlying decision states that Mitchell and Thompson worked in the building for 3 weeks after its purchase by Respondents. However, at the hearing counsel for Respondents acknowledged that the amounts shown on the social security reports were for "two weeks work." Accordingly, I find that the weekly rate of pay for Mitchell was $287 and the weekly rate of pay for Thompson was $234. Based on Mitchell's rate of pay, for the second quarter of 1991 beginning May 15 his gross backpay amounts to $1722. Deducting interim earnings of $600, his net backpay that quarter is $1122. For the third quarter of 1991 and subsequent quarters, gross backpay totals $3731 for each quarter. Since this amount is less than interim earnings, there is no backpay due for any quarter after the second quarter of 1991. Accordingly, the net backpay due Mitchell is $1122. With respect to Thompson, I have found that the backpay period begins May 13, 1991. Using the weekly rate of $234, for the second quarter of 1991 the gross backpay totals $1404. For the third quarter of 1991 and subsequent quarters gross backpay totals $3042 each quarter. For the second quarter of 1991 since there were no interim earnings, net backpay totals $1404. For the third quarter of 1991, deducting interim earnings of $924 from gross backpay of $3042 results in net backpay of $2118. For quarters subsequent to the third quarter of 1991 interim earnings exceed gross backpay. Accordingly, the net backpay due Thompson is $3522.

2. Efforts to obtain employment

Thompson testified that he submitted employment applications to various business establishments. Mitchell also testified that he submitted employment applications, that he made phone calls to business establishments, and that he looked in the want ad sections of several newspapers. An employer may mitigate his backpay liability by showing that a discriminatee "willfully incurred" loss by a "clearly unjustifiable refusal to take desirable new employment." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 199–200 (1941). This, however, is an affirmative defense and the burden is on the employer to prove the necessary facts. *NLRB v. Mooney Aircraft*, 366 F.2d 809, 813 (5th Cir. 1966); *Sioux Falls Stock Yards Co.*, 236 NLRB 543, 551 (1978); *ABC Automotive Products Corp.*, 319 NLRB 874, 877 (1995). The record contains evidence demonstrating the efforts made by the

discriminatees in attempting to seek employment. I find that Respondents have not sustained their burden of showing that the discriminatees did not "make reasonable efforts to find interim work." *NLRB v. Coca-Cola Bottling Co.*, 360 F.2d 569, 575–576 (5th Cir. 1966).

3. Concealment of earnings and reinstatement

After Judge MacDonald issued her decision the parties entered into settlement discussions. On March 22, 1993, counsel for General Counsel Kearns informed Respondents' counsel that he had received a social security report concerning Mitchell which revealed that Mitchell had underreported interim earnings by approximately $8000. Based on this information Respondents filed a motion to reopen the record. As noted earlier, the Board stated in its decision (313 NLRB 438 fn. 1):

> The Respondents' allegations, even if true, do not automatically compel a finding that reinstatement should be barred. *Owens Illinois*, 290 NLRB 1193 (1988), enfd. mem. 872 F.2d 413 (3d Cir. 1989). The impact of the alleged fraud on the remedy is a matter best left to the compliance stage of these proceedings.

Respondents contend that Mitchell should be denied backpay for all quarters that he had interim earnings with Dubrow Management. In *American Navigation Co.*, 268 NLRB 426, 427 (1983), the Board stated, "discriminatees found to have willfully concealed from the Board their interim employment will be denied backpay for all quarters in which they engaged in the employment so concealed." The Board continued, "This remedy will be applied, of course, only in cases where the claimant is found to have willfully deceived the Board, and not where the claimant, through inadvertence, fails to report earnings." (Id. at 428.) In order to deny the claimant backpay it is necessary to find that the claimant "willfully deceived the Board." I find nothing in the record to show that Mitchell "willfully" deceived the Board. On questioning by counsel for Respondents, Mitchell testified "I gave Mr. Jim Kearns the best of my knowledge. And sometime later on, I gave him the authorization to look into my social security." Respondents have not proven that Mitchell's underreporting constituted willful deceit of the Board. Accordingly, I decline to deduct backpay for those quarters in which Mitchell underreported his earnings.

In addition, Respondents contend that Mitchell should be denied reinstatement because of his alleged "fraud." As stated above, Respondents have not proven that Mitchell willfully deceived the Board and, accordingly, I declined to deduct backpay for the quarters he underreported his earnings. For the same reason it would not be appropriate for me to deny Mitchell reinstatement. I believe, however, that even were I to have found that Mitchell's underreporting of earnings constituted a willful deceit of the Board, a denial of reinstatement under the circumstances would not be warranted. As stated by the Board in *Owens Illinois*, supra, 290 NLRB at 1194:

> For all these reasons, we find, contrary to the judge, that it will not effectuate the purposes of the Act to require forfeiture of the traditional remedy of reinstatement with full backpay. Although we do not condone Colarusso's false testimony at the hearing, we do not find that conduct, under the circumstances present in this case, justifies the penalties imposed on Colarusso by the judge. [Footnote omitted.]

Respondents elicited testimony from Mitchell that as superintendent he would have keys to the building, would be given money to purchase supplies, and in some cases would give directions to the porters. Respondents contend that because Mitchell failed to disclose his interim earnings he is "unfit for further service" as a building superintendent. I do not believe that Respondents have satisfied their burden of showing that Mitchell's conduct was so "flagrant" as to render him unfit to serve as a building superintendent. See *Owens Illinois*, supra at 1193 fn. 5.

4. Thompson's offer of reinstatement

Respondents contend that Thompson received a valid offer of reinstatement on September 29, 1995. I credit Sperlin's testimony that a letter offering reinstatement to Thompson was mailed on September 29, 1995. Sperlin further credibly testified that while the letter was sent certified mail he did not recall if a return receipt was requested. Although the letter was sent to the proper address, Thompson testified that he did not receive the offer of reinstatement. I credit Thompson's testimony and find that Respondents mailed a valid offer of reinstatement on September 29, 1995, but that Thompson did not receive it.

In *Burnup & Sims*, 256 NLRB 965, 966 (1981), the Board held that where a respondent makes a good-faith effort to communicate a valid offer of reinstatement to the discriminatee, although it does not relieve respondent of the obligation to reinstate the discriminatee, it does toll respondent's backpay liability. See *Future Ambulette*, 307 NLRB 769, 771 (1992), enfd. 990 F.2d 622 (2d Cir. 1993). While the General Counsel argues that no green card was returned, I credit Sperlin's testimony that he did not remember if a return receipt was requested.[1] Accordingly, pursuant to *Burnup & Sims*, supra, I find that Respondents made a good-faith effort to communicate the offer of reinstatement to Thompson and this is sufficient to toll Respondents' backpay liability. However, it does not relieve Respondents of the obligation to reinstate Thompson. Accordingly, I shall order Respondents to offer reinstatement to Thompson.

5. Offset

Respondents contend that any backpay which may be awarded to Mitchell should be offset by the value of an apartment he allegedly refused to vacate. At the hearing Respondents amended their answer to include an affirmative defense that any backpay ordered to Mitchell be offset by the amount of $10,766, "which constitutes the loss of rent from the apartment that Mr. Mitchell refused to vacate in the period of time that he was terminated on May 15, 1991 through the time that the Housing Court ordered his eviction on July

[1] The judge stated, "It must be presumed . . . that either the green card was not returned, or that when it was returned it did not indicate that Williams received the letter." (Id. at 771.) The assumption in that case was that a return receipt was requested. In the instant proceeding, however, there is no evidence that a return receipt was requested.

13, 1992." In their brief Respondents request that I "take judicial notice that it is impossible to get any apartment in New York City for less than $500 a month." In the alternative, Respondents move "to reopen the record to permit the receipt into evidence of Exhibit A."

As stated in *Hansen Bros. Enterprises*, 313 NLRB 599, 600 (1993):

> The General Counsel's burden in backpay cases is simply to show the gross backpay due each claimant. The burden then shifts to the respondent to establish facts that negate or mitigate its liability.

See *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963). There is no evidence in the record to support Respondents' contention. As noted above, it is the burden of Respondents to present sufficient evidence to establish mitigation of backpay. In addition, I decline to take "judicial notice that it is impossible to get any apartment in New York City for less than $500 a month." Furthermore, I deny Respondents' motion to reopen the record to permit the receipt into evidence of Exhibit A, attached to their brief. Respondents have given no reason why Exhibit A was not introduced as evidence at the hearing so that opposing counsel would have had the opportunity to object, to offer their own evidence, or generally to litigate the issue. See *Grinnell Fire Protection Systems*, 307 NLRB 1452 fn. 2 (1992). Accordingly, I deny Respondents' request to offset the backpay amount due to Mitchell.

CONCLUSION OF LAW

I find that the backpay computations, as amended are appropriate. Respondents have not sustained their burden of showing that there should be any additional offsets. See *NLRB v. Brown & Root*, supra at 454.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondents, Hagar Management Corp. and 1025–1045 Associates, Inc., their officers, agents, successors, and assigns, shall within 14 days from the date of this Order offer Anthony Mitchell and Courtney Thompson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and shall pay them, as net backpay, the amount set forth opposite each name, plus interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),[3] less tax withholdings required by Federal and state laws.

Name	Amount Due
Anthony Mitchell	$1,122
Courtney Thompson	3,522
TOTAL	$4,644

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] Under *New Horizons* interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.